

A Rubaidah bte Dirin (suing as widow of Basia bin Bahari, deceased, on behalf of herself and the dependants of the deceased) v Ahmad bin Ariffin

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-04-111-

B 95
GOPAL SRI RAM, NH CHAN AND MAHADEV SHANKAR JJCA
3 DECEMBER 1996

Tort — Negligence — Contributory negligence — Dependency claim — Whether dependants entitled to full recovery regardless of extent of contributory negligence — Civil Law Act 1956 ss 7, 8, 12(1), (2) & (4)

C Civil Law Act — Tort (Negligence) — Contributory negligence — Whether dependants entitled to full recovery regardless of the extent of contributory negligence — Whether defendant must look to deceased's estate for contribution — Civil Law Act 1956 ss 7, 8, 12(1), (2) & (4)

D Damages — Fatal accident — Contributory negligence — Whether dependants entitled to full recovery regardless of the extent of contributory negligence — Whether defendant must look to deceased's estate for contribution — Civil Law Act 1956 ss 7, 8, 12(1), (2) & (4)

E The plaintiff made a dependency claim against the defendant, charging that the latter's negligence caused the death of her husband ('the deceased') in a head-on collision between her husband's motorcycle and the defendant's car. The plaintiff, suing on behalf of herself and her dependent children based their claim on s 7 of the Civil Law Act 1956 ('the Act').

F At the trial, evidence showed the cause of the deceased's death, and evidence adduced indicated that the deceased had suddenly emerged from behind another car and in his attempt to pass this car, swerved into the defendant's lane and collided into the front side of the defendant's car. The defendant did not brake but tried unsuccessfully to swerve out of the way. In the alternative, the plaintiff prayed for 100% liability against the defendant regardless of any contributory negligence of the deceased. The defendant relied on contributory negligence in that the deceased was the sole or substantial author of his own misfortune, and asked for apportionment of damages. The sessions judge found the defendant 100% liable, giving no reasons for this decision, and later when the case was appealed, made a written decision that that liability should have been apportioned equally between the deceased and the defendant, because there was no clear evidence to show how the accident happened. The sessions judge then stated it was up to the appellate court to decide whether to correct his finding of the defendant being 100% liable if it thought fit.

I The appeal before the High Court found the deceased 70% liable and the defendant 30% liable and calculated damages accordingly.

The plaintiff appealed the High Court's ruling, stating that regardless of the deceased's contributory negligence, the defendant should be 100% liable. A

Held, dismissing the appeal:

- (1) The initial finding of the sessions judge was perverse and his subsequent revision to a 50:50 liability was worthless because it was made after he had discharged his duties (see p 682H). B
- (2) The High Court's finding of 70:30 liability was supported by the evidence before the court and would not be disturbed by the Court of Appeal (see p 682I). C
- (3) Section 12(4) of the Act made it clear that if the deceased was contributorily negligent, the dependant plaintiff in a s 7 action could only recover from the defendant the proportion of the damage attributed to the defendant's share of the blame. The reduction for proven contributory negligence in a s 7 action was automatic. Section 7(5) only contemplated one action to be brought, thus the proportionate reduction in s 12(4) must take place in that action, and hence reduced the damages recoverable by the dependant plaintiff. The suggestion that the defendant had to look to the deceased's estate for contribution for the failure to take care of himself was misconceived, because contribution was something that tortfeasors claim from one another, and contributory negligence was a defence set up against the dependant plaintiff. The plaintiff had an independent right of action and was no way associated with the tortfeasor (see pp 686B and 687I); *Lim Chai Oon & Anor v Normah bte Ismail & Anor* [1994] 3 MLJ 488 followed, *Veronica Joseph (f), An Infant & Anor v Tu Kon Lin & Anor* [1987] 1 CLJ 81 not followed and *Maxfield v Llewellyn & Ors* [1961] 1 WLR 1119 distinguished. D
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F

[Bahasa Malaysia summary]

Plaintif membuat tuntutan tanggungan terhadap defendan, mendakwa bahawa kecuaian defendan telah menyebabkan kematian suaminya ('si mati') dalam pelanggaran depan sama depan di antara motorsikal suami plaintiff dan kereta defendan. Plaintiff menyaman bagi pihak dirinya sendiri dan anak-anak di bawah tanggungannya mengasaskan tuntutan mereka kepada s 7 Akta Undang-Undang Sivil 1956 ('Akta tersebut'). G
H

Pada masa perbicaraan, keterangan menunjukkan sebab kematian si mati, dan keterangan yang dikemukakan menunjukkan bahawa si mati dengan tiba-tiba muncul daripada belakang sebuah kereta lain dan dalam cubaannya untuk memotong kereta itu, membelok dengan tiba-tiba ke lorong defendan dan berlanggar dengan bahagian hadapan kereta defendan. Defendan tidak membrek tetapi cuba untuk membelok untuk mengelak, tetapi tidak berjaya. Sebagai alternatif, plaintiff menuntut 100% liabiliti terhadap defendan tanpa mengira I

- A apa-apa kecuaiian sertaan oleh si mati. Defendan bergantung kepada kecuaiian sertaan bahawa si mati adalah penyebab tunggal atau utama terhadap kemalangan yang menimpanya, dan meminta pembahagian gantirugi. Hakim mahkamah sesyen mendapati defendan 100% bertanggungjawab, tanpa memberi apa-apa sebab terhadap
- B keputusannya itu dan kemudiannya apabila kes itu dibuat rayuan, membuat keputusan bertulis bahawa liabiliti sepatutnya dibahagikan sama rata di antara si mati dan defendan, kerana tidak ada bukti yang jelas untuk menunjukkan bagaimana kemalangan itu berlaku. Hakim mahkamah sesyen kemudiannya menyatakan adalah terpulang kepada mahkamah rayuan untuk memutuskan sama ada untuk membetulkan pendapatnya bahawa defendan bertanggungjawab 100% sekiranya ia fikirkan betul.
- C

Rayuan di hadapan Mahkamah Tinggi mendapati si mati 70% bertanggungjawab dan defendan 30% bertanggungjawab dan mengira gantirugi sewajarnya.

- D Plaintiff membuat rayuan terhadap keputusan Mahkamah Tinggi, menyatakan bahawa tanpa mengira kecuaiian sertaan si mati, defendan sepatutnya 100% bertanggungjawab.

Diputuskan, menolak rayuan:

- E (1) Pendapat permulaan hakim mahkamah sesyen adalah bertentangan dan kajian semula kemudiannya kepada liabiliti 50:50 adalah tidak bernilai kerana ia dibuat selepas beliau telah menjalankan tanggungjawabnya (lihat ms 682H).
- (2) Pendapat Mahkamah Tinggi iaitu liabiliti 70:30 disokong oleh keterangan di hadapan mahkamah dan tidak akan diganggu oleh
- F Mahkamah Rayuan (lihat ms 682I).
- (3) Seksyen 12(4) Akta tersebut telah menjelaskan bahawa sekiranya si mati melakukan kecuaiian sertaan, plaintiff tanggungan dalam tindakan s 7 hanya boleh mendapatkan kembali daripada defendan sebahagian daripada kerugian yang disebabkan oleh kesalahan yang dilakukan oleh defendan. Pengurangan bagi kecuaiian sertaan yang dibuktikan dalam tindakan s 7 adalah automatik. Seksyen 7(5) hanya membayangkan satu tindakan untuk dibawa, oleh itu pengurangan yang bersekadar dalam s 12(4) mesti berlaku dalam tindakan itu, dan oleh itu gantirugi yang dikurangkan yang boleh didapatkan kembali oleh plaintiff tanggungan. Cadangan bahawa defendan perlu melihat kepada estet si mati untuk penyumbangan kerana kegagalan untuk menjaga diri sendiri adalah salah tanggapan, kerana penyumbangan adalah sesuatu yang pelaku tort menuntut daripada satu sama lain, dan kecuaiian sertaan adalah suatu pembelaan yang digunakan terhadap plaintiff tanggungan.
- I Plaintiff mempunyai hak tindakan yang tersendiri dan tidak berkaitan dengan pelaku tort dalam apa cara pun (lihat ms 686B dan 687I); *Lim Chai Oon & Anor v Normah bte Ismail & Anor* [1994] 3 MLJ 488 diikut, *Veronica Joseph (f), An Infant & Anor*

v Tu Kon Lin & Anor [1987] 1 CLJ 81 tidak diikuti dan *Maxfield v Llewellyn & Ors* [1961] 1 WLR 1119 dibeza.] A

Notes

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 445–475. B

For cases on claim for negligence, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2301–2308.

For cases on fatal accident, see 6 *Mallal's Digest* (4th Ed, 1992) paras 238–237.

Cases referred to C

Balachandran all Samy & Anor v Chew Man Chan @ Ah Yeow & Anor [1996] 1 CLJ 169 (refd)

Lim Chai Oon & Anor v Normah bte Ismail & Anor [1994] 3 MLJ 488 (folld)

Maimunah bte Hassan v Marimuthu (sebagai Wakil Harta Pusaka Rozita bte Khamis) & Satu Lagi v Marimuthu s/o Samanathan & Satu lagi [1993] 1 CLJ 119 (refd) D

Maxfield v Llewellyn & Ors [1961] 1 WLR 1119 (distsd)

Mulholland v McCrea [1961] NI 135

Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and another appeal [1996] 1 MLJ 576 (refd) E

Senior v Ward [1859] 1 E & E 385 (refd)

Stapley v Gypsum Mines Ltd [1953] AC 633 (refd)

Tara Singh v PP [1954] MLJ 123 (refd)

Veronica Joseph (f), An Infant & Anor v Tu Kon Lin & Anor [1987] 1 CLJ 81(not folld) F

Legislation referred to

Civil Law Act 1956 ss 7, 8, 12(1), (2), (4)

Administration of Justice Act 1982 [UK]

Law Reform (Contributory Negligence) Act 1945 [UK]

Law Reform (Married Women and Tortfeasors) Act 1935 [UK] G

Law Reform (Miscellaneous Provisions) Act 1934 [UK]

Law Reform (Miscellaneous Provisions) Act 1970 [UK]

Fatal Accidents Act 1846 [UK]

Appeal from: Civil Appeal No 12–75–94 (High Court, Shah Alam) H

Teh Poh Lian (Teh & Associates) for the appellant.

S Kanagasabapathi (RK Nathan & Co) for the respondent.

Cur Adv Vult I

Mahadev Shankar JCA (delivering the judgment of the court): The crucial issue in this appeal is whether in a dependency claim, the plaintiffs are entitled to effect total recovery of their damages from a defendant

A tortfeasor regardless of the extent to which the deceased was found contributorily negligent for his death.

A motorcyclist, Basia bin Bahari ('the deceased'), died in a head-on collision with a motorcar. Rubaidah bte Dirin ('the widow') filed an action for damages. The indorsement on the summons reads:

B The plaintiff brings this action under s 7 of the Civil Law Act 1956 for her own benefit and also for the benefit of her four children as dependants of Basia bin Bahari, deceased, caused by the negligence of the defendant in the driving, use or management of motor vehicle No WP 2349 on 2 November 1985 at or near the 16th milestone, Kuala Lumpur/Kuala Selangor and for interest and costs of this action.

C The statement of claim set out the usual details of a running down action and 'particulars pursuant to s 7 of the Civil Law Act 1956' ('the Act').

D The defence was a denial of negligence and coupled with a positive averment that the accident was caused solely or contributed to substantially by the negligence of the deceased in overtaking an unidentified motorcar and colliding with the defendant who was then on his correct side of the road.

E At the trial in December 1992, the widow's solicitors called the investigating officer who produced the sketch plan and key, and said the car was severely damaged on the front off-side — headlamp smashed, mudguard dented, tyre punctured, driver's door so dented it could not be opened, wind-screen smashed, etc. The damage to the deceased motorcycle was also very extensive. There were no glass fragments found on the road, because all the fragments were inside the car. No eye witness was located. The second and third witnesses gave evidence of the deceased's employment and earnings. The fourth witness was the widow who gave evidence of dependency. The defendant then gave evidence. He produced his police report made on 19 November 1985, ie 17 days after the accident. In it, he claimed the deceased had emerged at great speed from behind the on-coming vehicle. The defendant did not brake but swerved left. The collision nevertheless took place.

G There were no scratch marks on the road. There was a blood spot 30cm or about two feet eight inches inside the defendant's part of the road. The severed right hand of the deceased was found on the defendant's left verge about 20 meters behind the defendant's car. The deceased's body was on his verge about 33 meters beyond the blood spot and his motorcycle even further away. The post-mortem report showed fatal fractures to the deceased's skull. The only possible inference from all this was that the collision had taken place when both vehicles were going fast with the motorcyclist at least 80cm into the defendant's side of the road when he collided head-on into the front off-side of the defendant's car, broke his head and died very shortly thereafter.

I The widow's counsel submitted that the accident occurred by reason of the substantial negligence of the defendant. In the alternative, he relied on *Veronica Joseph (f), An Infant & Anor v Tu Kon Lin & Anor* [1987] 1 CLJ 81 ('*Veronica*') and prayed for 100% liability against the defendant

in any event. The defendant's counsel submitted that the deceased was the sole or substantial author of his own misfortune, and asked for apportionment based on *Lim Chai Oon & Anor v Normah bte Ismail & Anor* [1994] 2 MLJ 488 ('*Lim Chai Oon*'). A

In a reserved judgment, the sessions judge said the defendant was 100% liable for the accident. He gave no reasons, and awarded RM75,000 damages. Subsequently, at the request of the plaintiff, he awarded a further RM10,000 for bereavement and RM1,500 for expenses incurred for burial expenses. B

The defendant appealed. The sessions judge gave an undated written judgment in which he said that in the absence of clear evidence as to how the accident happened, he should have apportioned liability 50:50 and that his mistake in finding the defendant 100% liable should be corrected by the appellate court if it thought fit. C

The appeal came before the High Court judge at Shah Alam. The notes of evidence recites the names of counsel and merely states: D

Hakim bicara betul.

This is of no assistance to us.

The judge then gave his decision as follows:

Rayuan dibenarkan dengan kos.

Liabiliti — plaintiff 70%:30% defendan E

Kuantum — RM310 x 8½ x 12 months.

The widow appealed.

In his grounds of judgment, the judge said he had reviewed the evidence and found the deceased 70% liable and the defendant 30% liable for the accident, and assessed damages for dependency on the basis of a monthly loss of dependency at RM310 per month (ie RM310 x 12 x 8½) plus bereavement of RM10,000 and burial expenses of RM1,500. F

He did not comment on *Veronica's* case aforesaid or *Lim Chai Oon*. The order of the High Court, however, has reduced the damages to a proportionate extent. So, we may infer that he preferred to follow *Lim Chai Oon*. G

Counsel for the widow submitted that regardless of the deceased's share of blame, we should impose 100% liability on the defendant.

The initial finding of the sessions judge was perverse. His subsequent revision to 50:50 is commendable to the extent that he admitted his mistake, but in law it is worthless because he was functus officio by that stage. On any view of the matter, the deceased was the substantial author of his own misfortune, but there was some material to support the judge's finding of 70:30 liability for the accident and his assessment of the value of the loss of support at RM310 per month. H I

Veronica was followed or preferred to *Lim Chai Oon* in the following cases:

- A (1) *Maimunah bte Hassan v Marimuthu (Sebagai Wakil Harta Pusaka Rozita bte Khamis) & Satu Lagi v Marimuthu s/o Samanathan & Satu lagi* [1993] 1 CLJ 119.
- (2) *Balachandran all Samy & Anor v Chew Man Chan @ Ah Yeow & Anor* [1996] 1 CLJ 169.
- B (3) *Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and another appeal* [1996] 1 MLJ 576.

Before we submit these decisions to an in-depth analysis, we think it is worthwhile emphasizing that all persons concerned in the judicial process of enforcing a statutory remedy should have an overview of the statute as a whole before picking out one or two sections for application. In this way, we avoid inconsistency and distortions in the remedy which was intended to be provided. We start with ss 7 and 8 of the Act. The relevant portions are reproduced hereunder with emphasis added on those words we consider especially relevant to the present exercise:

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PART III

FATAL ACCIDENTS AND SURVIVAL OF CAUSES OF ACTION

7 Compensation to the family of a person for loss occasioned by his death

- E (1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code.
- F (2) Every such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.
- ...
- G (5) Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased.
- (6) In any such action the executor of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by the wrongful act, neglect or default, which sum when recovered shall be deemed part of the assets of the estate of the deceased.
- H ...
- (8) If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the person deceased, been brought by the executor, the action may be brought by all or any of the persons, if more than one, for whose benefit the action would have been brought if it had been brought by the executor,
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and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it was brought by the executor. A

Section 8:

- 8 Effect of death on certain causes of action B
- (1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate: ...
- (5) The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes not expressly excepted by the operation of subsection (1). C D

The provisions relating to contributory negligence are contained in Pt V and the relevant section is s 12(1), (2) and (4). They read as follows:

PART V

Contributory Negligence And Common Employment E

- 12 Apportionment of liability in case of contributory negligence
- (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: ... F
- (2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault. ... G
- (4) Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under section 8, the damages recoverable would be reduced under subsection (1), any damages recoverable in any action brought for the benefit of the dependants of that person under section 7 or for the benefit of the husband of that person under proviso (iii) of subsection (3) of section 7 or of the spouse or parents under subsection (3B) of section 7 shall be reduced to a proportionate extent. H I

At common law, no action was maintainable for causing death. The first statutory exception to this rule was made by the Fatal Accidents Act 1846

A ('the Fatal Accidents Act'). It was stimulated by the spate of railway accidents after the advent of rail transport (see *McGregor on Damages* (13th Ed) at p 791). This Act has been subsequently amended a number of times in the United Kingdom right up to a consolidating statute in 1976.

B It must be emphasized that the basis of the dependency action in s 7 of the Act is indisputably derivative. It only lies if the defendant's default was such as would have entitled the deceased to maintain an action *if he had not been killed*. Consequently, all the defences which would have been open to the defendant had he been sued by the deceased when the deceased was alive, would equally avail the defendant notwithstanding the death of the deceased. If, prior to his death, the deceased's right to sue had been extinguished, for any reason, the dependants could not bring any claim at all. Reference may be made to 31 *Halsbury's Statutes* (4th Ed) at p 204 which lists various defences available against the dependants under the Fatal Accidents Act which were available against the deceased, when he had been alive. So, until the position was changed by the United Kingdom Law Reform (Contributory Negligence) Act 1945 ('the 1945 Act'), the contributory negligence of the deceased was also a complete defence to a dependency claim under the Fatal Accidents Act (see *Senior v Ward* [1859] 1 E & E 385). Until we imported the equivalent of the 1945 Act into our laws, that was the position in Malaysia also.

E It should also be noted that it was the executor of the deceased estate who had to bring the claim under s 7 for the benefit of the dependants. There was only one cause of action. The dependants could only bring the action in their own names after six months if by that time an executor had not done so.

F A spate of road accidents led to the passing of the United Kingdom Law Reform (Miscellaneous Provisions) Act 1934 which provided for the survival of all causes of action. Section 8 of the Act has its genesis in this English statute. Before it, causes of action vested in a deceased or subsisting against him abated on his death. After it came into force, contributory negligence was also a complete defence to this action.

G It is to overcome this that the 1945 Act was passed. Contributory negligence ceased to be a defence, but could be pleaded in reduction. The provisions of the 1945 Act for the purposes of the present exercise may be considered to be in *pari materia* with s 12 of the Act.

H Thus, ss 7, 8 and 12 of the Act are an amalgam of three English statutes. The equivalent of Pt IV of our Act which deals with actions against and proceedings for contribution between joint and several tortfeasors is a fourth and distinct English statute, ie the Law Reform (Married Women and Tortfeasors) Act 1935.

I To recapitulate, until the 1945 Act was passed, a successful plea of contributory negligence on the part of a deceased was enough to defeat a claim by his dependants or by his estate. But where a person was killed by the negligence of one or more tortfeasors and the deceased could in no way be identified with the cause of his death, his dependants or estate could of course elect which tortfeasor to sue, and upon recovering judgment against

any or all of them, again elect against whom they wished to effect full recovery and leave that tortfeasor to sue for contribution from the others who had had been held liable or if sued could have been held liable. A

We should have thought that the words of s 12(4) of the Act are clear enough to indicate that if the deceased was contributorily negligent, the dependant plaintiffs in a s 7 action can only recover from any or all the tortfeasors liable, such proportion of their damages as can be attributed to the defendants' share of blame. Since only one action can be brought for a death by s 7(5) of the Act, the reduction to a proportionate extent required by s 12(4) must take place in that action. Such reduction is to the *damages recoverable by the dependants* in that action. The statute does not envisage a situation where the dependants may recover the total amount of their damages unreduced from one or more defendants and leave them to claim contribution in some other action. B C

So, *Clerk & Lindsell on Torts* (12th Ed, 1961) says in para 395 at p 219:

If at the moment of death the right of action of the deceased is barred, eg by a contract excluding himself from the right to claim damages, by accord and satisfaction, or by the operation of a statute of limitation, the dependants' right is also barred; if it would have been affected by his own contributory negligence, the damages awarded to his dependants will be proportionately reduced (Law Reform (Contributory Negligence) Act 1945 (8 & 9 Geo 6, c 28), s 1 (4)). D E

Salmond on the Laws of Torts (17th Ed, 1977) says at p 584:

If the deceased has been guilty of contributory negligence, the Fatal Accidents Act 1976, s 5, provides that the damages awarded under that Act may be reduced proportionately, and the same rules applies by analogy if a plaintiff dependant has been guilty of contributory negligence. F

And *Winfield and Jolowicz on Torts* (13th Ed, 1989) say at p 650:

But so long as the deceased's claim has not become statute barred when he dies, then the dependants have the full three years from the death (or, in certain cases, the time when they know they have a cause of action) in which to sue, for their claim which arises on the death has no connection with the deceased's. It is thus somewhat illogical, though doubtless good practical sense, that, since the Law Reform (Contributory Negligence) Act 1945, if the deceased was himself partly to blame for the accident which caused his death, the damages recoverable by his dependants are reduced in proportion to his share of responsibility for the accident. Before the Act of 1945, of course, the dependants could have recovered nothing for the deceased could not himself have sued. G H

This is an appropriate time for us to consider the English cases to which the learned trial judge in *Veronica* referred in support of his conclusion because we think with respect, that had he been properly briefed, he would not have decided as he did. I

Mallett v Dunn [1949] 2 KB 1980 was emphatically not a dependency claim or even a claim for the benefit of the deceased wife's estate. It was a claim by a husband for the loss of consortium and servitium arising from injuries to

- A his wife from which she died. See *Clerk and Lindsell* at para 683 and 36(1) *The Digest* para 1188 at p 291 which reads:

A husband who sues for damages caused to him by reason of injuries negligently inflicted on his wife sues in his own right, the fact that the wife was guilty of contributory negligence neither defeats his claim at common law nor causes any diminution of his damages under the Law Reform (Contributory Negligence) Act 1945.

B

If only as a matter of academic interest, it may be observed that *Mallett v Dunn* has become legal history in the United Kingdom with the abolition of the cause of action for loss of services or consortium (see the Law Reform (Miscellaneous Provisions) Act 1970 and Administration of Justice Act 1982 — both referred to in *Winfield and Jolowicz* at p 497).

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Maxfield v Llewellyn & Ors [1961] 1 WLR 1119 is distinguishable in that even though the action was one under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act 1934 (ie our ss 7 and 8), the plaintiff was the widow of the deceased *pillion rider* in a three-vehicle collision, ie the post-office van, the cattle truck and the motorcycle. The widow sued the drivers of the cattle truck and the post-office van. She did not sue the deceased motorcyclist's estate. Nor did the two defendants. The trial judge found the cattle truck driver 100% liable. On appeal, he asked the court to apportion some blame on the van driver *and* to the deceased motorcyclist. The van driver contended that the trial judge's finding should not be disturbed because there could be no apportionment unless all three parties were before the court. The appellate court refused to allocate any liability against the motorcyclist's estate *in absentia*, but apportioned liability between the cattle truck driver and van driver two-thirds and one-third. This decision is certainly not authority for the proposition that the dependents of a deceased who is contributorily negligent can recover their damages in full.

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The trial judge in *Veronica*, and the judge in *Balachandran all Samy* both erred in failing to appreciate the true significance of the word 'if' in s 12(4). Since by s 8(1) of the Act all causes of action vested in a person or subsisting against him survive for the benefit of the estate, or against it as the case may be, in an action brought against him by the deceased executor or administrator, a defendant tortfeasor can claim, as a matter of right, to have his damages reduced to the extent of the deceased's contributory negligence. The court must do so in that action. The object of s 12(4) was to import this right into claims brought for the benefit of dependants under s 7 — by the executor, in the first place, or the dependants themselves in their own names six months later. The s 8 action referred to in s 12(4) is hypothetical. The reduction for proven contributory negligence in a s 7 action is automatic. The suggestion in *Veronica* that a defendant tortfeasor must look to the deceased's estate for contribution for the failure of the deceased *to take care of himself* is totally misconceived. Contribution is something tortfeasors claim from each other. The contributory negligence of the deceased for his own death is a defence which is set up against the dependant plaintiffs.

To make sure that we have made ourselves absolutely clear, we think it desirable to reproduce here the relevant passage in *Winfield and Jolowicz on Torts* at p 168:

Where the acts of two or more defendants combine to injure the plaintiff, each is liable to the plaintiff for the whole amount of the loss, though as between the defendants, the court has a statutory power to apportion liability. Both matters are usually settled in the same proceedings, but there are two stages. First, the court must determine liability and decide what deduction if any is to be made for the plaintiff's contributory negligence. This is done by comparing the plaintiff's conduct on the one hand with the totality of the tortious conduct of the other: the question at this stage is not 'what is the relative share of responsibility of each and every part?' but 'how far is the plaintiff the author of his own loss?'. The respective shares of the resulting liability are then determined in the contribution proceedings, which are no concern of the plaintiffs. Hence, if at the first stage the court concludes that the plaintiff is 50% responsible, there is judgment against both defendants for 50% of the damage. If the defendants' responsibility inter se is equal, then, assuming both to be solvent, each one will finally bear 25% of the loss. If, however, the court concludes that the plaintiff is only one third to blame, then, the correct judgment is for two-thirds of the damage against both defendants, even though the plaintiff is as much at fault as either defendant.

There is a clear distinction between the question of which of the defendant should be forced to pay the plaintiff on the one hand, and how much the defendants can recover from each other. Once again, we return to *Winfield and Jolowicz on Torts* at pp 594 and 595:

The amount of contribution ordered is to be 'such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question'. The principles would seem to be the same as for the apportionment of damages between plaintiff and defendant in the other legislation dealing with concurrent fault, the Law Reform (Contributory Negligence) Act 1945, so that the court must look at both causation and culpability. The question is one of proportion, not of principle, involving an individual exercise of discretion by the trial judge and, for that reason, appellate courts will be reluctant to interfere with an apportionment as determined by the judge. If it considers it appropriate, the court may exempt the defendant from any liability to make contribution (contrast the Law Reform (Contributory Negligence) Act 1945, where, once a finding has been made that the plaintiff is guilty of contributory negligence, the court is obliged to reduced the damages: ante, p 168) or direct that the contribution recoverable shall amount to a complete indemnity. The court's powers are, however, subject to the overriding principle that one defendant cannot, by way of contribution proceedings, be liable for a greater sum than could be recovered from him by the plaintiff.

The analysis of the other English cases referred to by the trial judge in *Veronica* was also faulty by reason of a failure to distinguish between a plaintiff with an independent right of action who could in no way be associated with the tortfeasors, and those plaintiffs who could directly or vicariously be identified with the negligence in question. Thus, in *Mulholland v McCrea* [1961] NI 135, where a husband's own negligence partly

- A contributed to the death of his wife, his dependency claim was reduced in proportion to his share of responsibility. *Stapley v Gypsum Mines Ltd* [1953] AC 633 is significant to the extent that passengers and pillion riders may have such a community of interest with the driver in the purpose of the journey or the ownership of the vehicle so as to be identified with or be regarded vicariously liable for his negligence (see cases in 36(1) *The Digest* (1976) pp 304–305).
- B

We feel we have said enough to show that *Veronica* is demonstrably incorrect and should not be followed. The lawyers who persuaded the trial judge to arrive at that finding and those who perpetuated it must share in the collective responsibility for the adverse repercussions which have followed. By the same token and for the additional reasons we have spelt out here we say that *Lim Chai Oon* was correctly decided.

- C
- In *Tara Singh v PP* [1954] MLJ 123 at p 125, Buhagiar J said this:

- D As Kuerji J points out in *Smith v Emperor* (1926) ILR 53 Cal 333, the difficulty in dealing with a case of this nature is to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that an injury has been caused and the responsibility for the same ultimately rests with none else but the accused; this prejudice is bound more or less to reflect on the question of culpability of the accused and give rise to false issues which tend to cloud judicial vision.

- E The same sentiments could equally apply in a dependency claim where a family has lost their breadwinner. However, the duty of the court is to apply the law as it finds it and not to create judicial foundations for a welfare state. We do not think our legislation was ever intended to produce a windfall for the dependants of deceased persons who were substantially the authors of their own misfortune.

- F We therefore dismissed this appeal.

We ordered that each party bear its own costs throughout this litigation, because until *Veronica* was properly overruled, neither party had any choice but to act as they did.

- G *Appeal dismissed.*

Reported by K Tang-Wai

H

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